

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED
JUL 12 1995

In the Matter of)	
)	DOCKET FILE COPY ORIGINAL
Implementation of Section 309(j))	
of the Communications Act -)	PP Docket No. 93-253
Competitive Bidding)	
)	
Amendment of the Commission's)	
Cellular PCS Cross-Ownership Rule)	GN Docket No. 90-314
)	
Implementation of Sections 3(n))	
and 332 of the Communications Act)	GN Docket No. 93-252
Regulatory Treatment of Mobile)	
Services)	
)	

To: The Commission

**COMMENTS OF THE NATIONAL ASSOCIATION
OF BLACK OWNED BROADCASTERS INC.**

The National Association of Black Owned Broadcasters, Inc. ("NABOB"), hereby submits its Comments in the above-captioned proceedings in response to the Further Notice of Proposed Rule Making, released June 23, 1995 (the "NPRM"). NABOB submits that the Commission's proposal to radically change its PCS rules just weeks before the C band auction is: (1) not required by the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 63 U.S.L.W. 4523 (U.S. June 12, 1995) ("Adarand"), (2) is inconsistent with the analysis of the Adarand decision prepared by the U.S. Department of

Justice, and (3) will seriously disrupt business arrangements already negotiated by minority entrepreneurs in reliance upon the Commission's original PCS rules, and may preclude some minority entrepreneurs from being able to enter the C block auction at all. In particular, the Commission's proposal to eliminate the affiliation exclusion for minority owned applicants will compromise some agreed upon bidding arrangements to the extent that the applicants will not be able to bid.

I. THE COMMISSION'S PROPOSED CHANGE TO ITS AFFILIATION RULE MAY PRECLUDE SOME MINORITY BIDDERS FROM BEING ABLE TO PARTICIPATE IN THE C BLOCK AUCTION

The Commission stated in the NPRM that it intended to make rule changes which were "the least disruptive to bidders." NPRM at 2. As we shall explain below, NABOB submits that no changes should be made or are required to be made to the Commission's C block auction rules. However, assuming arguendo that the Commission is determined to alter its rules so as to make them completely race and gender neutral, such concerns for neutrality do not require the Commission to completely eliminate its affiliation exclusion rule which is currently applicable to minority owned companies.

Section. 24.720(1)(11)(ii) of the Commission's rules currently provides that "an entity controlled by members of minority groups

is not considered an affiliate of an applicant (or licensee) that qualif[ies] as a business owned by members of minority groups and/or women if affiliation would arise solely from control of such entity by members of the applicant's (or licensee's) control group who are members of minority groups."

The Commission adopted this exclusion from the affiliation rule in the Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403 (1994) ("Fifth MO&O"). The Commission stated when it adopted this exclusion provision that:

As we documented in the Fifth Report & Order, minorities have faced and continue to face unique barriers to capital from traditional, non-minority sources. To raise capital for a new business venture, therefore, minorities need the ability to draw upon the financial strength and business experience of successful minorities and minority-owned businesses within their own communities; they may not have access to any other source of funds on which to draw. Moreover, this exception permits minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past.

Fifth MO&O at ¶ 41.

The Commission was correct to adopt this exclusion provision. At the time the Commission adopted this exclusion provision it was provided with information which demonstrated that there are virtually no minority owned companies in the wireless communications business and very few minority owned companies in

the U.S. with revenues over \$40 million in any industry. Therefore, given the paucity of financially successful companies and individuals within minority communities, the Commission correctly concluded that the exclusion provision was necessary because otherwise application of the affiliation rule to minority applicants would reduce the pool of potential and viable minority investors to a level which would preclude many minority entrepreneurs from being able to attract capital.

In addition, the Commission was presented with information which demonstrated that, given the lack of successful business owners and operators in the minority community, minority entrepreneurs would need the benefits of the exclusion provision in order to be able to include the experience, expertise and credibility of successful minority entrepreneurs in their respective control groups to attract capital.

The Commission's proposal to eliminate this affiliation exclusion ignores this reality. Unless the Commission reconsiders this proposal, it will prevent many bidders from including experienced, successful entrepreneurs in their control groups, which in turn may cause such bidders to lose financing already arranged and may preclude them from being able to bid at all.

To rectify this situation, NABOB requests that the Commission amend the affiliation rule exclusion of Section 24.720(1)(11)(ii) to read as follows:

An entity controlled by an individual in the control group of a small business applicant (or licensee) is not considered an affiliate of the applicant (or licensee) if the entity would qualify to bid in the entrepreneurs block, as specified in Section 24.709(a)(1), i.e., if the entity has less than \$125 million in gross revenues and less than \$500 million in gross assets.

It has been suggested that this proposal, if applied to the entire ownership of a small business applicant, may be too expansive, in that it may allow individuals who control entities larger than \$40 million in gross revenues to evade the small business definition by bidding as individuals rather than through their companies. In response to this concern, NABOB submits the following observations.

First, it should be noted that a business owner bidding as an individual, rather than as his or her business, will be significantly limited in his or her ability to bring to bear the resources of his or her business in the bidding process.

Second, if the Commission considers the affiliation exclusion proposed above to be too expansive, the Commission could adopt the exclusion, but limit its application to no more than 50% of the equity held by the control group. In other words, if the control

group holds 50.1% of the equity of the applicant, the applicant could exclude the affiliations only of individuals holding no more than 50% of the 50.1% ($50\% \times 50.1\% = 25.05\%$), i.e., holders of no more than 25.05% of such an applicant's equity could receive the benefit of the affiliation exclusion. Similarly, if the control group owns 75% of an applicant's equity, holders of 37.5% of the applicant's equity could receive the benefit of the affiliation exclusion.

If the Commission adopts this modified proposal for the affiliation exclusion, the effect will be to permit cooperative ventures between successful individuals and entrepreneurs, thus promoting the kind of joint undertakings the Commission has attempted to achieve elsewhere in its rules.

Therefore, NABOB submits that the public interest will be served by adopting an exception to the affiliation rule allowing applicants to exclude from their attribution determination affiliates controlled by persons in the applicant's control group, if each such affiliate is of a size that would qualify it to bid in the C block auction.

In addition, it should be noted that this proposal to exclude certain affiliates from consideration in determining small business eligibility will not have as great an impact on the potential

bidding as the Commission's decision to completely eliminate the net worth test for bidding in the entrepreneurs block. See Fifth MO&O at ¶ 30. With no net worth limit, the Commission's rules currently permit a billionaire, such as Craig McCaw, to bid in the C block auction. Therefore, if the Commission is truly interested in preventing wealthy individuals from dominating the C block auction, it should begin by precluding individuals with gross income over \$125 million or gross assets over \$500 million from controlling an applicant in the C block, even if the individual controls no other affiliates.

II. THE ADARAND DECISION DOES NOT REQUIRE THE COMMISSION TO CHANGE ITS AUCTION RULES AND THE COMMISSION SHOULD MAKE NO CHANGES

It is the position of NABOB that Adarand does not require the Commission to make any changes in the designated entity rules which will be applied in the C block auction. The Adarand decision held only that reviewing courts must use a "strict scrutiny standard" when analyzing racial classifications. The Court did not rule whether the statutory scheme before it, or any other statutory scheme, fails to meet the strict scrutiny standard. The Court certainly made no ruling as to the statutory scheme relied upon by the Commission in adopting its PCS auction rules.

On June 14, 1995, the President of the United States issued a statement in which he stated:

It is regrettable that already, with the ink barely dry, many are using the Court's opinion as a reason to abandon [the affirmative action] fight. Exaggerated claims about the end of affirmative action -- whether in celebration or dismay -- do not serve the interest all of us have in a responsible national conversation about how to move forward together and create equal opportunity.

The President's statement makes clear that the President does not consider the Supreme Court's decision to require a retreat on existing governmental affirmative action policies. Therefore, we urge the Commission to proceed with the acceptance of Form 175 applications for the C block auction at the earliest possible date, and to begin the auction as scheduled on August 2. Our reasons for proposing this course of conduct are the following:

1. The Commission has a statutory obligation under Section 309(j) of the Communications Act to promote ownership opportunities for minorities when auctioning the nation's radio frequency spectrum. The Commission may not abdicate that statutory responsibility on the "possibility" that the statute may be challenged. It is the role of the Commission to implement Congress's statutory directives until the courts rule specifically that such statutory directives are unlawful. It is not the Commission's role to engage in "cat and mouse" games of litigation

anticipation with parties who feel that the mere presence of minorities is injurious to their interests. In the Adarand decision, the Court did not rule that Section 309(j), or any other statute passed by Congress, is unconstitutional. Absent such a specific ruling, the Commission is still required to fulfill its statutory obligation to proceed with the implementation of Section 309(j). Indeed, Chief Justice Rehnquist has recently observed that all Acts of Congress are "presumptively constitutional" and "should remain in effect pending a final decision on the merits." Turner Broadcasting System, Inc. V. FCC, 113 S.Ct. 1806, 1807 (1993) (Rehnquist, C.J. in chambers) (quoting, Marshall v. Barlow's, Inc., 429 U.S. 1347, 1348 (1977) (Rehnquist, J. In chambers)).

2. In the Adarand decision, a bare five justice majority of the Court held that "strict scrutiny" is the standard of review which should be employed when analyzing legislative enactments which are designed to remedy the effects of racial discrimination. However, the Court did not apply that standard to the facts before it, or to the facts of any other case. Most importantly, the Court did not even address the issue of the type of record Congress or the Commission must create to adopt a race-based remedy for past discrimination, despite the Court's extensive discussion of prior precedent in this area.

3. The Adarand decision provides no basis for determining whether any legislative or agency action fails to meet the strict scrutiny standard. It certainly provides no basis for determining whether (a) Section 309(j) of the Communications Act fails to meet the strict scrutiny standard, or (b) whether the Commission's rules implementing Section 309(j) fail to meet the strict scrutiny standard.

4. Seven justices of the Court agreed in the Adarand decision that racial discrimination continues to be a reality of American life today and that race-based policies to address the effects of past racial discrimination are constitutionally permissible. "[We] wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." (Citation omitted, emphasis added)

5. The Commission has a well documented record to support its broadband PCS auction rules. The Commission spent over a year developing the record and revising its rules to carefully implement the specific statutory requirements of Section 309(j).

6. The record established by the Commission is more than adequate to demonstrate that: (a) there is a compelling government interest in creating economic opportunity for the past and present victims of racial discrimination, (b) there is a compelling First Amendment governmental interest to promote minority ownership and control of the frequencies which will be used to transmit communication, information and entertainment services to the American people well into the 21st century, (c) the lack of present ownership by minorities in the telecommunications industry is directly attributable to the effects of past and present racial discrimination, and (d) since the auction rules are revisited for each service the Commission auctions, the race-based policies will not last longer than the discriminatory effects they are designed to eliminate.

7. The Commission's record supporting the compelling need to remedy the effects of past racial discrimination dates back at least to 1968 when the Commission adopted its first equal employment opportunity rules. This places the Commission in a much different evidentiary position than the City of Richmond in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

8. The record relied upon by Congress to support Section 309(j) dates back to the earliest civil rights statutes and well

precedes the Supreme Court's decision in Fullilove v. Klutznick, 448 U.S. 448 (1980).

9. If the Commission abandons its statutory obligation to provide minority ownership incentives in the C block broadband PCS auction, it will result in a substantial change in the Commission's rules upon which minority bidders have relied upon in creating their business plans, raising their financing, and in foregoing the opportunity to participate in the A and B block auctions. Sudden reversal of the rules may preclude some of those entities from being able to bid at all. Such a last minute abandonment of the Commission's minority ownership incentives only a few days before the application filing deadline raises substantial legal questions of notice and opportunity to comment under the Administrative Procedure Act, as well as general considerations of equity and due process.

10. Abandonment of the minority ownership incentives may result in the C block broadband PCS auction mirroring the result of the A and B block PCS auction and the national narrowband PCS auction -- no successful minority bidders.

**III. THE COMMISSION'S PROPOSAL TO ELIMINATE ALL RACE AND GENDER
BASED POLICIES FROM ITS AUCTION RULES IS INCONSISTENT WITH THE
POSITION OF THE U.S. DEPARTMENT OF JUSTICE**

At the time the Commission issued its NPRM it had not yet received any guidance from the U.S. Department of Justice on the legal implications of the Adarand decision on the policies of the U.S. Government designed to respond to the effects of past and present racial discrimination. On June 28, 1995, the Justice Department issued a "Memorandum to General Counsels" from Walter Dellinger, Assistant Attorney General (the "Justice Department Memorandum"). The Justice Department Memorandum provides a very detailed analysis of the Adarand decision. The Justice Department concludes from its analysis that the Adarand decision does not require a retreat from existing policies designed to remedy the effects of past and present racial discrimination. Justice Department Memorandum at 34.

Included in the analysis by the Justice Department is a detailed accounting of the very many questions left unanswered by the Adarand decision. Among these questions are: (1) did the program before the Court in Adarand meet the test for strict scrutiny, (2) does any other program of the federal government meet the strict scrutiny standard, (3) what deference will courts give to determinations by Congress that affirmative action is necessary,

(4) may a governmental entity justify an affirmative action program based upon nonremedial objectives such as promoting diversity and inclusion, and (5) may a governmental institution rely upon post-enactment evidence to support a program to remedy past discrimination? Id. at 2.

The failure of the Court in Adarand to answer the question of whether a governmental institution may rely upon post-enactment evidence to support a program to remedy past and present discrimination is pivotal with respect to the Commission's C block auction rules. The Justice Department Memorandum indicates that, absent a determination on this issue on the Adarand decision, the lower courts are left to proceed under their application of the strict scrutiny standard adopted in the Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The Justice Department Memorandum reports that every lower court which has had this question presented to it subsequent to the Croson decision has allowed such post-enactment evidence to be introduced to support the affirmative action program at issue. Id. at 2, 13, n. 26, citing, Concrete Works v. City & County of Denver, 36 F.3d 1523, 1521 (10th Cir. 1994); Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1004 (3d Cir. 1993); Coral Constr. Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991); Harrison & Burrowes Bridge

Constructors, Inc. V Cuomo, 981 F.2d 50, 60 (2d Cir. 1992).

For the Commission, this willingness of the courts to consider post-enactment evidence supporting the necessity of an affirmative action program means that the Commission may proceed with the C block auction under its current rules while developing the record necessary to meet the strict scrutiny standard should the auction rules be challenged. Thus, the Justice Department Memorandum provides guidance that was unavailable to the Commission at the time it adopted its NPRM. This new information demonstrates that the Commission need not adopt the radical rule changes it has proposed in the NPRM. As the Justice Department Memorandum concludes, "Adarand makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decisionmaking to determine if they comport with the strict scrutiny standard. No affirmative action program should be suspended prior to such an evaluation." (Emphasis added) NABOB requests that the Commission reconsider the preliminary conclusions of its NPRM in light of the Justice Department Memorandum and retain its current auction rules for the C block auction without any changes.

IV. THE COMMISSION CAN TAKE STEPS TO AVOID THE POTENTIAL PROBLEMS RAISED BY ADARAND

In order to avoid an auction which results in few or no successful minority bidders, the Commission should adopt the following course of conduct:

1. Proceed with the auction as currently planned with the rules currently in place.

2. The Commission has no way of knowing at this time whether it will be sued prior to the August 2 auction. Further, even if sued, the Commission does know at this time whether it will be enjoined. If the Commission is sued and enjoined from proceeding with the auction prior to August 2, the Commission should then decide whether to revise its auction rules in light of any specific ruling by the applicable court. To abandon its minority ownership incentives prior to receiving such a ruling from a court would constitute an abrogation of its responsibility to carry out its mandate from Congress.

3. If the Commission is not sued and enjoined, it should proceed with the August 2 auction under its current rules without revision.

4. Any minority bidder concerned that any license it wins in the auction will be subject to potential post-auction legal

challenges is already permitted under the Commission's rules to forego the minority ownership incentives. Such an applicant need only choose not to fill in the portion of the application which asks if the applicant plans to take advantage of those rules. Those prospective minority bidders who believe that they need the minority incentive provisions should not be precluded from receiving those incentives because some potential minority applicants feel they do not need those incentives.

5. Moreover, to provide even more flexibility for bidders to avoid judicial challenge, the Commission should amend its bidding procedures to allow all applicants to wait until after the auction to choose whether to utilize the bidding preferences. Then, in the event bidding is not as intense as currently contemplated, minority bidders may find that they do not need the bidding credits to bid successfully. This approach could result in the best of both worlds. Minority bidders could, at the conclusion of the auction, elect whether to spend more money to avoid the uncertainty caused by litigation, and the C block PCS auction could be completed with little chance of post-auction litigation.

V. CONCLUSION

The Adarand decision did not rule on the constitutionality of Section 309(j) or on the constitutionality of the rules the Commission adopted to implement Section 309(j). It would be a violation of the Commission's statutory obligation for the Commission to disregard its statutory mandate without having been directed to do so by a reviewing court.

A decision by the Commission to eliminate its minority ownership incentives at this stage would constitute exactly the type of abandonment of affirmative action the President spoke against. NABOB urges the Commission to meet its statutory obligation to implement Section 309(j) and to proceed with the August 2 auction without making any *sua sponte* last-minute changes to its rules. Such action could impose irreparable injury to potential bidders who have prepared to bid in the auction based upon the Commission's announced rules.

Respectfully submitted,

The National Association of
Black Owned Broadcasters

By: 

James L. Winston
Rubin, Winston, Diercks,
Harris & Cooke
1333 New Hampshire Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 861-0870

By: 

Lois E. Wright
Vice President and
Corporate Counsel
Inner City Broadcasting
Corporation
Three Park Avenue, 40th Floor
New York, NY 10014
(212) 592-0408

July 7, 1995